DEPARTMENT OF COMMERCIAL LAW.

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BRASS AND IRON WORKS CO. *v.* PAYNE.[1] SUPREME COURT OF OHIO.

Goodwill—Partnership—Sale—What passes—Firm name—Right to use.

1. The goodwill of a partnership is a part of the property of the firm; and when, on a dissolution of the partnership, one of the partners transfers to the others all his interest in the firm business and assets, with the understanding that they are to succeed to the business of the old firm, such sale carries with it the vendor's interest in the goodwill.

2. The firm name is part of this goodwill, and the right to use it accordingly passes to the purchasing partners; and when the contract of sale reserves to the retiring partner no right with respect to that name, he cannot lawfully use it in a business of a like kind, carried on by him in the vicinity subsequent to such dissolution.

3. In a proper case a court of equity will perpetually enjoin such unlawful use of the firm name by the retiring partner.

GOODWILL AS PARTNERSHIP PROPERTY.

I. *Its nature and incidents.*—(*a*). According to Lord Eldon, in Cruttwell *v.* Lye, 17 Ves. 335, it is "nothing more than the probability that the old customers will resort to the old place." Moreau *v.* Edwards, 2 Tenn. Ch. 347. Others have defined it as "the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on:" England *v.* Downs, 6 Beav. 269. The probability that the business will continue in the future as in the past: Bell *v.* Ellis, 33 Cal. 620. Every possible advantage acquired by the firm in carrying on its business, whether connected with the premises or the name, or other matters: Ginesi *v.* Cooper, 14 Ch. D. 596; Farwell *v.* Huling, 132 Ill. 112; and see Fay *v.* Fay (N. J.), 6 Atl. Rep. 12. The favor which the management of a business wins from the public, and the probability that old customers will continue their patronage: Chit-

[1]Reported in 33 N. E. Rep. 88.

tenden *v.* Witbeck, 50 Mich. 401; S. C., 15 N. W. Rep. 526. And the probability that its old customers will continue their custom and commend it to others: Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215.

These definitions, however, are only partial. While it is true that the main business of a firm is securing customers, and then serving them, it is equally clear that the valuable element of the goodwill is that which attracts the customers. That is, that in order to properly define goodwill, we must go back of the vague generalizing which speaks of it as the probability of securing the old customers, and specify the causes which create that probability. It is true that in so doing we are going beyond the proper bounds of a definition, for these causes are legion; but nothing else can give an adequate idea of what goodwill really is. Accordingly, the description given by Mr. Justice STORY, in his work on Partnership (7th Ed.), § 99, is far preferable to any of those previously cited. "This goodwill" he says, "may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Yet this, too, is too bulky to be of practical use: and what more does it amount to than that the goodwill of a business is the right to succeed to it, or to carry it on as the successor of the old firm? This last definition, it is contended, covers every material point, and does away with a great deal of the haze which, as we shall see, still clings around the subject.

(*b*). The sources of goodwill being so various, it is evident that it must be an open question whether, in a given case, it is an incident of the trade of the premises on which it is carried on, or of the personnel of the firm; and that that question can only be settled on the special circumstances of the case. It has been said that the general rule is to regard the goodwill as an incident of the premises: Rawson *v.* Pratt, 91 Ind. 9; England *v.* Downs, 6 Beav. 269; Austen *v.* Boys, 2 DeG. & J. 626; S. C., 4 Jur. N. S. 721; Bergamini *v.* Bastian, 35 La. An. 60; Elliott's App., 60 Pa. 161. And there are many cases in which this would be true, as in case of a tavern or a hotel: Elliott's App., *supra*. Or where business and premises are both leased: Chittenden *v.* Wiltbeck, 50 Mich. 401; S. C., 15 N. W. Rep. 526; Chissum *v.* Dewes, 5 Russ. 29; Mitchell *v.* Reed, 19 Hun. (N. Y.) 418; S. C., 84 N. Y. 556. But when the business is carried on independently by the firm, and the premises only are leased, it certainly seems the better opinion to hold the goodwill an incident of the trade: Succession of Jean Journé, 21 La. An. 391.

A good instance of the absurd results to which the strict application of this rule would lead, is to be found in Austin *v.* Boys, 2 DeG. & J. 626; S. C., 4 Jur. N. S. 721, where it was gravely ruled that goodwill, being connected with place, was inapplicable to the busi-

ness of a solicitor, which has no local existence, but is purely personal, depending on the trust and confidence which persons may repose in the integrity and ability of the solicitor to conduct their legal affairs. But why should they not repose the same confidence in his integrity and ability to select a proper successor? At any rate, the validity of the sale of the business of a professional man (except a clergyman, who is too apt to have no good will to dispose of), is too well settled to be called in question; and nothing but the goodwill can pass by such a sale, unless we are to assume that the vendee was too innocent to know that he pays an exorbitant sum for the mere material subjects of the contract.

Goodwill, then, does not necessarily depend exclusively on locality, it may also depend, to some extent, on the personal qualities of the proprietor of the business; and though this is a matter very difficult to transfer, there seems to be no doubt that it can be done, figuratively at least, in such a way that the vendee can reap some benefit from it; and that is all that any sale of goodwill amounts to. It is equally clear that it may depend upon the nature of the trade, in certain instances, as where certain patents are owned by the firm, or it has the reputation of making a certain brand of goods; and this is especially true in modern times, when goods are sent to such distances for sale. It makes no difference to the man who wants a Winchester rifle, a Remington typewriter, or a Disston saw, whether those articles are made in Massachusetts, Pennsylvania, or Patagonia. What difference, then, could locality make if the right to make and sell those goods were to be sold?

(*c*). But whether dependent on person, trade, or place, the goodwill of a business is a valuable property right: Potter *v.* Comrs., 10 Exch. 147; Senter *v.* Davis, 38 Cal. 450. It is part of the assets of a business: Wallingford *v.* Burr, 17 Neb. 137. It is part of the assets of a decedent: Succession of Jean Journé. 21 La. An. 391, and must be accounted for by his personal representative. If an executor conducts the business as his own, he is chargeable with the value of the goodwill; but that goodwill does not include the right to use the name of the decedent: Randell's Est., 8 N. Y., Suppl. 652. It is equally a part of partnership property: Bell *v.* Ellis, 33 Cal. 620.

Goodwill may be the subject of a contract of sale: Carruthers *v.* McMurray, 75 Iowa, 173, but only in connection with the business, of which it is an incident. It cannot be sold apart from that business, either by judicial sale, or otherwise. A mortgage of the "machinery, type, presses, cases, furniture, paper, forms and tools of a newspaper company, together with the goodwill" of its business, cannot be foreclosed as to the goodwill, after all the tangible property covered by the mortgage has been alienated, worn out, or destroyed, and the corporation has become consolidated with another newspaper corporation: Met. Natl. Bk. *v.* St. L. Dispatch Co., 36 Fed. Rep. 722.

A misrepresentation in regard to the goodwill of a business is, when the two are sold together, material and fraudulent: Cruess *v.* Fessler, 39 Cal. 336. And when the con-

tract for the sale of the stock and goodwill of a business is an entirety, the vendor cannot relieve himself from liability for fraud in respect to the goodwill by proving the stock to be worth the full amount paid: Herfort *v.* Cramer, 7 Colo. 483.

If the right conveyed by a sale of the goodwill of a business be unlawfully taken away and destroyed, the law will award a compensation, as in case of injury to any other right; and this rule is applicable to the issuing of an attachment on the stock in trade in a case growing out of the sale of stock and goodwill, whereby customers were kept away: Carey *v.* Gunnison (Iowa), 17 N. W. Rep. 881.

One who has paid for the goodwill of a business cannot recover the price paid on the ground that the goodwill was not vendible: Buckingham *v.* Waters, 14 Cal. 146.

As goodwill can be sold, it can also be mortgaged, assigned, or taken in execution, in connection, of course, with the business to which it is incident: Met. Nat'l Bk. *v.* St. L. Dispatch Co., 36 Fed. Rep. 722; Potter *v.* Comrs., 10 Exch. 147; Walker *v.* Mottram, 19 Ch. D. 355; Hudson *v.* Osborne, 39 L. J. Ch. (N. S.) 79. But not if dependent solely upon the personal skill of the proprietor: Cooper *v.* Met. Board of Works, 25 Ch. D. 472.

II. *Sale of Goodwill.*—As the sale of the goodwill of a business practically amounts to giving up to the vendee the right of the old firm to deal as such with its old customers, and whatever new ones may be attracted by its special advantages, the only tangible right that the vendee acquires is that of holding himself out as the successor of the old firm; and to that extent only, it would seem, the law, in the absence of special circumstances, will protect him. This is what seems to be meant by the expression in Bradford *v.* Peckham, 9 R. I. 250, that goodwill is the goodwill as the vendor used it, and only coextensive with the business carried on. Accordingly, the sale of a trade or business, with the goodwill, does not prevent the vendor from setting up again in a similar trade or business, without an express covenant, or fraud in inducing the vendee or others to believe that he would not engage in the same again, or the like: Cruttwell *v.* Lye, 17 Ves. 335; Shackle *v.* Baker, 14 Ves. 468; Churton *v.* Douglas, 1 Johns. (Eng.) Ch. 174; Davies *v.* Hodgson, 25 Beav. 177; Bergamini *v.* Bastian, 35 La. An. 60; Bassett *v.* Percival, 5 Allen (Mass.), 345; Hoxie *v.* Chaney, 143 Mass. 592; Rupp *v.* Over, 3 Brewst. (Pa.) 133; Moreau *v.* Edwards, 2 Tenn., Ch. 347; Washburn *v.* Dorsch (Wis.), 32 N. W. Rep. 551. But though the sale of goodwill does not take away the vendor's right to engage in the same business again, it does preclude him from interfering actively with the benefits and advantages of the business sold; and he therefore has no right to hold himself out as the successor of the old firm, or as continuing its business: Hudson *v.* Osborne, 39 L. J. Ch. (N. S.) 79; Dwight *v.* Hamilton, 113 Mass. 175; Smith *v.* Gibbs, 44 N. H. 335; Hall's App., 60 Pa. 458. Nor (though there is some difference of opinion on this question), has he a right to directly solicit trade from the customers of the old firm; although there would seem to be

no reason against his doing so by general advertising, and he can certainly deal with them if they come unsolicited: Ginesi *v.* Cooper, 14 Ch. D. 596, as modified by Leggott *v.* Barrett, 15 Ch. D. 306; S. C., 43 L. T. N. S. 641; Labouchere *v.* Dawson, 13 L. R. Eq. 322, as modified by Walker *v.* Mottram, 19 Ch. D. 355, and Pearson *v.* Pearson, 27 Ch. D. 145.

The vendor may, however, bind himself by express covenant or agreement not to engage in the same business again within a certain area or time; and this restriction, if reasonable, will bind him: Howard *v.* Taylor, 90 Ala. 241; Morgan *v.* Perhamus, 36 Ohio St. 517; Thompson *v.* Andrews (Mich.), 41 N. W. Rep. 683. But he may engage in business outside of the limitation, or at the expiration of the time, and, it has been held, may solicit his old customers, though this hardly seems consonant with sound reasoning: Hanna *v.* Andrews, 50 Iowa, 462.

Conveying, as it does, the exclusive right of succession to the business of the old firm, the sale of the goodwill carries with it as incidents whatever is necessary to effectuate that right, as the trade-marks and trade-name of the former firm: Levy *v.* Walker, 10 Ch. D. 447; S. C. (C. A.), 48 L. J. Ch. (N. S.) 273; Caswell *v.* Hazard, 2 N. Y. Suppl. 783; Drake *v.* Dodsworth, 4 Kans. 159; *contra*, Lewis *v.* Smith, 8 Pa. C. C. R. 327. This rule is especially applicable to the case of a newspaper. "The goodwill of a newspaper establishment often constitutes its largest value. A majority of the subscribers are generally permanent. They become attached to the paper on account of its sentiments, whether political, religious, or literary, and the ability and energy with which it is conducted. The habit of reading a particular paper periodically seems to stimulate a desire for its continuance. Subscribers, once obtained, are permanent customers, not only for the paper, but for advertising and job work:" Boon *v.* Moss, 70 N. Y. 465.

The goodwill which merely pertains to the place of business, however (whatever that may be), does not carry with it the right to use the firm name: Morgan *v.* Schuyler, 79 N. Y. 490. And no sale of goodwill can carry with it the right to use a firm name, which is the individual name of the vendor, without an express agreement to that effect: Churton *v.* Douglas, 1 Johns. (Eng.) Ch. 174; Thynne *v.* Shove, 45 Ch. D. 577; Howe *v.* Searing, 6 Bosw. (N. Y.) 354; Vonderbank *v.* Schmidt (La.), 10 So. Rep. 615. Yet in such a case the vendor, though at liberty to engage in business again, as we have seen, may not use his own name again in such a way as to lead others to believe that his is a continuation of the old business: Churton *v.* Douglas, *supra*.

There is no substantial difference between a sale of goodwill made by a trader himself, and a forced sale, on execution or by an assignee; and the rules previously laid down apply equally to the latter class of sales: Hudson *v.* Osborne, 39 L. J. Ch. (N. S.) 79, with perhaps the single exception, which seems to be founded on a true equity, that a forced sale will not preclude the passive vendor from soliciting his old customers, if he again engage in business: Walker *v.* Mottram, 19 Ch. D. 355.

It has been ruled that a sale of a

business, without any mention of goodwill, does not carry the latter; but that can only be true when there are circumstances to show that the assets of the business only were included in the sale: Hebert *v.* Dupaty, 42 La. An. 343; S. C., 7 So. Rep. 580; Costello *v.* Eddy, 12 N. Y. Suppl. 236; S. C. aff. 128 N. Y. 650; 29 N. E. Rep. 146. The proper presumption would seem to be that the goodwill is included in the sale, at least where the assets are not worth the price paid, or where lists of customers are included: Boon *v.* Moss, 70 N. Y. 465. But this reduces it to a mere question of fact in every case.

III. *Goodwill of Partnership Firms.*—The goodwill is an asset of the partnership: Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Hall *v.* Barrows, 10 Jur. (N. S.) 55; Reynolds *v.* Bullock, 47 L. J. Ch. (N. S.) 773; S. C., 26 W. R. 678; Bell *v.* Ellis, 33 Cal. 620; Williams *v.* Wilson, 4 Sandf. Ch. 379; Brass & Iron Works Co. *v.* Payne (the principal case), (Ohio) 33 N. E. Rep. 88. In pursuance of the old notion that partnership was akin to joint tenancy, it was formerly held in England that it went to the surviving partner: Hammond *v.* Douglas, 5 Ves. 539; Crawshay *v.* Collins, 15 Ves. 218; Lewis *v.* Langdon, 7 Sim. 421. But that relic of antiquity is now destroyed, and it is acknowledged everywhere that it does not survive, but forms a part of the general assets of the partnership: Wedderburn *v.* Wedderburn, 22 Beav. 84; Smith *v.* Everett, 27 Beav. 446; Holden *v.* McMakin, 1 Pars. Eq. Cas. 270; Dougherty *v.* VanNostrand, 1 Hoff. Ch. 68. And if one partner appropriate it on the dissolution of the firm by death, he will either be enjoined from so doing, or be made to account for it: Willett *v.* Blanford, 1 Hare, 253; Rammelsberg *v.* Mitchell, 29 Ohio St. 22. But he may retain it, upon payment of its full value: Shepard *v.* Boggs, 9 9 Neb. 257.

Where the partnership is kept secret, and the business conducted in the name of the accounting partner, there is no goodwill to account for (which goes to prove the contention that goodwill depends very little on place): Smith *v.* Wood, 12 N. Y. Suppl. 724. And the same would seem to be true where the business expires by its own limitation, or by agreement, each partner having the right to compete for the business of the old firm: Hall *v.* Hall, 20 Beav. 139; Van Dyke *v.* Jackson, 1 E. D. Smith (N. Y.), 419; Lobeck *v.* Lee (Neb.), 55 N. W. Rep. 650; Musselman's App., 62 Pa. 81; Rice *v.* Angell, 73 Tex. 350; *contra*, Bininger *v.* Clark, 10 Abb. (N. Y.) Pr. (N. S.) 264. This rule may be changed by express agreement between the partners, either in the articles of partnership, or otherwise: Turner *v.* Major, 3 Giff. 442. And there are certain businesses, as the publication of a newspaper, in which the goodwill is so important a factor in the value of the partnership property that the rule would not justly apply: Dayton *v.* Wilkes, 17 How. (N. Y.) Pr. 510.

As in other cases, the sale of the interest of one partner in the goodwill of the business to another, does not prevent the retiring partner from setting up in the same business; but it does confer on the purchasing partner the exclusive right to represent himself as the successor of the old firm, and the retiring partner may not lawfully do

any act tending to mislead others into the belief that he is such successor, or that the purchasing partner is not: Smith *v.* Everett, 27 Beav. 446; Leggott *v.* Barrett, 15 Ch. D. 306; S. C., 43 L. T. (N. S.) 641; Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122; White *v.* Jones, 1 Abb. (N. Y.) Pr. (N. S.) 328; Moody *v.* Thomas, 1 Disney (Ohio), 294; Williams *v.* Farrand (Mich.), 50 N. W. Rep. 446; Brass & Iron Works Co. *v.* Payne (Ohio) (the principal case), 33 N. E. Rep. 88. The same rule holds good as to a surviving partner: Davies *v.* Hodgson, 25 Beav. 177; Johnson *v.* Holliday, 2 DeG. J. & S. 446. But the retiring partner may bind himself not to engage in business, or interfere with the other's trade: Dethlefs *v.* Tamsen, 7 Daly (N. Y.), 354; Hollis *v.* Shafer (Kans.), 17 Pac. Rep. 86.

Partners who have sold out their interest in the goodwill of a business to a co-partner will be restrained from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business: Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215. So, when two partners had sold to a third their share of the property of the partnership, and their interest in the goodwill of the business, and had agreed in writing not to do anything which should in any wise impair or injure the said interest in the goodwill; but thereafter engaged in the same business and competed with the vendee, but did not specially solicit trade, it was held that an injunction would issue to restrain them from soliciting, doing, or obtaining business from any of the customers of the old firm, and from doing anything to impair or injure the said interest in the goodwill: Angier *v.* Webber, 14 Allen (Mass.), 211. But this is not now law to the extent indicated; and upon the present state of authority they could only be restrained from soliciting the old customers, or otherwise actively impairing the value of the goodwill.

On a bill filed by one of the partners to wind up the partnership, a receiver will be appointed to carry on the business, if necessary to preserve the goodwill: Marten *v.* Van Schaick, 4 Paige (N. Y.), 479.

As a rule, the sale by one partner to another of all the partnership property, with the understanding that the purchasing partner is to succeed to the business of the old firm, carries with it the goodwill as an incident: Brass & Iron Works Co. *v.* Payne (Ohio) (the principal case), 33 N. E. Rep. 88. The firm name, being part of the goodwill, passes by a sale thereof, and becomes the exclusive property of the purchasing partner: Burckhardt *v.* Burckhardt, 42 Ohio St. 474; Brass & Iron Works Co. *v.* Payne (Ohio), *supra*.

These rules do not always hold good, however, and are largely dependent on circumstances: Reeves *v.* Denicke, 12 Abb. (N. Y.), Pr. (N. S.) 92; Howe *v.* Searing, 6 Bosw. (N. Y.) 354; S. C., 10 Abb. (N. Y.) Pr. 264.

One partner can bind the other by a sale of the goodwill, as of any other item of partnership property: Moreau *v.* Edwards, 2 Tenn. Ch. 347.

IV. *Its Value.*—The value of the goodwill of a business, of course, cannot be shown with certainty: Burckhardt *v.* Burckhardt, 42 Ohio, St. 474. It is dependent upon the

business it represents: Byrne *v.* Stewart, 124 Pa. 450. And is to be calculated by estimating every advantage secured by succeeding to the business, without reference to the exclusion of any person from engaging in the same business: Rammelsberg *v.* Mitchell, 29 Ohio, St. 22. In one case, it was assessed at one year's average net profits: Mellersh *v.* Keen, 28 Beav. 453.

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WILMOTH *v.* HENSEL.[1] SUPREME COURT OF PENNSYLVANIA.

Reward—How Earned—Validity of Contract—Who liable.

1. A reward offered for the prosecution and conviction of persons who violate any of the statutes against bribery or corruption at elections, is earned by procuring the prosecution, followed by a plea of not guilty, of a tax collector who issued false tax receipts. The fact that sentence was suspended is not material, the word conviction being construed in its popular and not its technical sense.

2. It is not against public policy to offer a reward for the conviction of offenses thereafter committed against election laws, nor is such a contract without consideration, if acted on in good faith. The *bona fides* of such a transaction, where the evidence is conflicting as to whether or not the plaintiff induced the commission of the crime in order to procure the reward, is for the jury.

3. When defendant, as chairman of a state political committee, signed and published an offer of reward for the conviction of persons who should violate the election laws, and subsequently, at a public meeting, declared that he had $1000 to pay for such a conviction, the question as to his personal liability on the offer is for the jury.

REWARDS.

I. *How the Contract is Formed.*—A reward, which is a promise, made usually by public advertisement, either to a particular person or persons, or to any or all persons, to pay a certain sum of money to one who will perform certain services enumerated in the offer, belongs to the class of conditional contracts, and no liability arises upon it until it is made complete by acceptance and performance of its conditions.

No special form is necessary to the validity of such a contract. In

[1] Reported in 151 Pa. St. 200; 31 W. N. C. 237; 25 Atl. Rep. 86.